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# In the Supreme Court of the United States

OCTOBER TERM, 1945

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No. 333

DES MOINES COUNTY, IOWA, AND STATE OF IOWA,  
PETITIONERS

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the district court (R. 35-46) is not reported. The opinion of the circuit court of appeals (R. 326-329) is reported in 148 F. (2d) 448.

## JURISDICTION

The judgment of the circuit court of appeals was entered on April 24, 1945 (R. 329-330). The petition for rehearing was filed on May 8, 1945 (R. 331-336) and denied on May 23, 1945 (R. 337). The petition for a writ of certiorari was filed on August 17, 1945. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether the obligation to pay just compensation for the taking of a highway easement is satisfied by the cost of providing necessary substitute roads.

#### STATEMENT

This case arose from condemnation proceedings instituted on June 18, 1943, to acquire 48.25 miles of secondary roads and highways within the Iowa Ordnance Plant (R. 1-9) in Des Moines County, Iowa. A declaration of taking was filed the same date pursuant to the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258a, \$1.00 being deposited as estimated compensation (R. 11-14).

Des Moines County and the State of Iowa, both of which asserted a determinable fee title to the roads, filed claims for compensation for the "real estate" to the same extent as if title were in fee simple absolute, fixing the value of the physical property taken, including bridges, culverts, surfacing and other improvements at approximately \$182,000 (R. 31-32, 49). In addition, the county claimed \$106,281 for the construction of "further highways" to provide access for the owners of farm lands, particularly in the vicinity of the Skunk River which is subject to periodic overflow (R. 33-34), and the state claimed \$118,000 for

"damages occasioned to the remainder" of the highway system measured by the cost of relocating highways around the Ordnance area, including repairs to the Skunk River road (R. 50).

At the trial without a jury, the court limited defendants' proof to the "fair and reasonable value of what is taken" (R. 57) as distinguished from what the court called "resulting damages" (R. 56), namely, the claims of the county and state for further highways outside the area (R. 59, 60-62). Hence the evidence produced by defendants was directed solely to the cost of replacement of the highways, including bridges and culverts, less certain allowances for depreciation (cf. R. 79, 105, 112, 153, 155, 157, 160-161, 291-292, 296, 297). To all such testimony of value the Government objected (R. 157, 165, 166, 169, 291, 292, 296-297) on the theory that it did not tend to prove the proper measure of compensation. Accordingly, at the close of the trial it moved to strike all testimony giving a valuation in whole or in part to the roads, bridges and culverts lying within the area (R. 305-306). The objections and motion were overruled.

Although it pointed out that there might be instances where the county would be entitled to an alternate highway (R. 64), the position of the Government at the trial was that the proper measure of compensation was nominal value (R. 297, 306) because Iowa law compelled neither the

county nor the state to provide substitute roads (R. 77; cf. R. 105, 167, 168). The trial court agreed with the Government's view that there was no enforceable duty to provide substitute roads (R. 62-63). Thus when defendants offered to prove that the cost of making the Skunk River passable throughout the year would be \$118,000 (R. 167) and that such construction was necessary (R. 72-77), the Government objected on the same theory that it had objected to proof of the actual value of the roads taken within the area—that only nominal damages could be recovered (R. 77, 167, 297, 306). The court sustained the objections, but for the reasons that the landowners affected lived outside the area (R. 77-78) and that recovery of the cost of improving the River road would constitute "double damages" (R. 167).

Basing its conclusion upon the evidence as to cost of reproduction, the district court found that the fair value of the roads taken, including all improvements, was \$175,000, and that the state was entitled to the award (R. 306-309). Judgment was entered accordingly (R. 309).

Upon appeal by the Government, the circuit court of appeals held that the cost of providing necessary substitute roads, rather than the replacement value or reproduction cost of the roads taken, was the proper measure of compensation. Accordingly, the judgment was reversed and the cause remanded to the district court with directions to

ascertain and award the petitioners (or whichever of them is entitled thereto) the cost of providing substitute roads, if any, needed to replace the roads taken (R. 329-330). The circuit court of appeals in its opinion (R. 326-329) rejected the contention made by the Government at the trial and on appeal, that only nominal damages were payable because Iowa law did not impose upon the local authorities a legally enforceable duty to provide substitutes, holding that when new roads are necessary it is of no legal consequence whether the duty to provide substitutes is express or implied or arises from necessity (R. 328). On the ground that the error of the district court in rejecting evidence was too plain and vital to be ignored where the public interest is involved, the court below likewise rejected petitioners' argument that the error was induced by the Government and hence furnished no ground for reversal (R. 328-329).

#### ARGUMENT

1. Petitioners' complaint is almost entirely based upon the assertion that their property is being taken without compensation (see, *e. g.* Pet. 7, 9, 13, 16-17), but no such case is presented here. Upon remand, petitioners will have ample opportunity to prove that substitute roads are necessary and to prove the cost of furnishing such substitutes. Thus, the issue presented really is whether the cost of substitute roads, instead of replace-

ment value or reproduction cost of the roads taken, is the proper measure of compensation. In *Brown v. United States*, 263 U. S. 78, 83, this Court recognized that substitution in kind was the best method of providing compensation when streets and alleys are taken, stating "A method of compensation by substitution would seem to be the best means of making the parties whole." (Cf. Pet. 4, 6, 22.) The decisions of the federal courts have uniformly recognized that the only right arising from the taking of highway easements is a right of exoneration from the cost of constructing whatever substitute roads may be necessary. Just compensation to a county for roads taken is measured by the cost of making the necessary readjustments in its road system. *Jefferson County, Tennessee v. Tennessee Valley Authority*, 146 F. (2d) 564, 566 (C. C. A. 6), certiorari denied April 9, 1945, October Term, 1944, No. 1020; *Mayor and City Council of Baltimore v. United States*, 147 F. (2d) 786, 790 (C. C. A. 4), affirming *United States v. Certain Parcels of Land*, 54 F. Supp. 667 (D. Md.); *Wayne County, Kentucky v. United States*, 53 Ct. Cl. 417, affirmed, 252 U. S. 574; *Town of Nahant v. United States*, 136 Fed. 273 (C. C. A. 1); *United States v. Town of Nahant*, 153 Fed. 520 (C. C. A. 1); *Town of Bedford v. United States*, 23 F. (2d) 453 (C. C. A. 1); *United States v. Wheeler Township*, 66 F.

(2d) 977 (C. C. A. 8); *United States v. Alderson*, 53 F. Supp. 528 (S. D. W. Va.).

Where there is no need to provide a substitute highway or where an existing substitute is adequate, only nominal damages are recoverable for the taking of the highway easement. *Mayor and City Council of Baltimore v. United States*, 147 F. (2d) 786, 790 (C. C. A. 4); *United States v. Alderson*, 53 F. Supp. 528, 531 (S. D. W. Va.); *United States v. Prince William County*, 9 F. Supp. 219, 221 (E. D. Va.), affirmed, 79 F. (2d) 1007 (C. C. A. 4), certiorari denied, 297 U. S. 714; cf. *United States v. Certain Parcels of Land*, 45 F. Supp. 899, 900, 902 (E. D. Wash.)

The policy behind these decisions is clear. Roads have no market value. They are of value to a county only to the extent that they enable it to meet its obligations to its citizens. Neither the original cost nor the reproduction cost of the roads taken bears any relation to the amount of the loss. The readjustment of its road system may cost the county substantially more or substantially less than the replacement cost of the roads taken. If more, the county would not be made whole by a payment based on the reproduction cost of the roads taken; if less, it would receive an unwarranted windfall. It is this windfall for which petitioners here contend. In their answers, the county and state admitted that the cost of substi-

tute roads would not exceed \$106,000 and \$118,000, respectively (R. 33-34, 50). Under the foregoing authorities (*supra*, p. 6), such was the maximum value of the highway easements in question. Petitioners seek to distinguish some of these authorities on the ground that there the cost of relocation was more than the cost of reproduction. (Pet. 13-15, 22). Certainly there is nothing to support petitioners' contention that they are entitled to whichever is more expensive as between cost of relocation and cost of reproduction. The fallacy in petitioners' argument (Pet. 7) that if value is measured by the cost of substitutes the state would receive nothing for roads costing millions of dollars lies in the fact that such large sums would not have been expended on roads unless they were necessary and, hence, upon the taking the United States would be required to pay the cost of a substitute.<sup>1</sup>

Petitioners contend, in support of their theory that the cost of a substitute road is not just compensation, that their rights in these roads, although in the nature of easements, were the same as a fee so long as they were exercised. They cite cases (Pet. 12) wherein the fee title to land was conveyed to the grantee so long as it was

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<sup>1</sup> It is to be noted that State Primary highway No. 16 was vacated and no claim to compensation is involved here as to that road (R. 23, 67-68).

used for a certain purpose, and the land was valued upon condemnation as though it were an absolute fee because the event upon which the possessory estate in fee simple defeasible was to end was not likely to occur within a reasonably short time. Under Iowa law the abutting owners had the existing fee title, and upon abandonment of the roads the unencumbered use would vest in them and not in petitioners. *Clare v. Wogan*, 204 Iowa 1021, 1024; *Kitzman v. Greenhalgh*, 164 Iowa 166, 169. For purposes of valuation, the limitation to highway uses cannot be disregarded and the land treated not only as though it were owned in fee simple but also as though it could be used by petitioners for any purpose. Whatever the state of the title, petitioners used the property only for purposes of a road, and it must be deemed that they would continue to use it only for those purposes. *Chicago, Burlington, Etc. R'd v. Chicago*, 166 U. S. 226, 250-251; cf. *Mayor and City Council of Baltimore v. United States*, 147 F. (2d) 786, 789 (C. C. A. 4).

2. Petitioners' complaint (Pet. 17-21) that the error was induced by the United States is simply an attack upon the exercise by the court below of the discretion which it possesses to correct plain errors in spite of procedural deficiencies. There can be no question that power to do so exists (*Hormel v. Helvering*, 312 U. S. 552, 556-557;

*United States v. Harrell*, 133 F. (2d) 504, 506-507 (C. C. A. 8); *United States v. Certain Parcels of Land, Etc.*, 144 F. (2d) 626 (C. C. A. 3)) and we submit that, under the circumstances, it was properly exercised. Moreover, the error was not, as petitioners assert, induced by the Government nor did it change its position upon appeal. Pursuant to its contention that only nominal damages were payable, the United States objected to all of petitioner's evidence. Furthermore, petitioners claimed both the cost of substitutes and cost of reproduction (R. 29-35, 48-50). The Government's motion to compel them to elect between these two claims having failed (R. 46-47, 51-52, 56), objection was made to the evidence offered by petitioners to support each claim in order to preserve the Government's position that petitioners could not recover both items. It was the trial court, not the Government, that stated the erroneous theory that to allow the substitution evidence would permit the recovery of consequential damages (R. 61-62). Thus, the Government did not agree with the trial court's conclusion that the cost of reproduction was the proper measure of compensation, and objection to evidence in support thereof was preserved in every way possible (R. 157, 165, 166, 169, 291, 292, 296-297, 305-306). It cannot be said, therefore, that the error in valuing the roads on a reproduction theory was induced by the United States.

## CONCLUSION

The decision of the circuit court of appeals is in accordance with established principles of law. There is no conflict of decisions. It is therefore respectfully submitted that the petition should be denied.

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SEPTEMBER 1945.